Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-20 OF 2009(W) (NO 2)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), ZULKEFLI AND GOPAL SRI RAM FCJJ
16 NOVEMBER 2009

Trusts and Trustees — Constructive trust — Arrangement to jointly own property — Third party acquired trust property without notice of trust — Purchase price released to second respondent — Whether appellant unlawfully deprived of legitimate interest in property — Whether appellant bereft of any effective remedy against respondents

The appellant, a Japanese citizen and the first respondent were business partners in a restaurant. The appellant and first respondent as partners then agreed to embark on a joint venture which involved the acquisition of the shop house ('the property') in which they operated their restaurant business. Upon acquiring the property, the first respondent sought to retain it for her own benefit. When the matter came before this court, it regarded the first respondent as a constructive trustee and held the appellant entitled to a half share in the trust property as a beneficiary under the constructive trust. The appellant was also entitled to claim it from the first respondent and to trace her half share in the property into the hands of anyone who acquired it. This court also made consequential orders to give effect to its judgment, which included the entry of a registrar's caveat. It then emerged that the second respondent had sold the property to a third party who acquired it without notice of the trust in the appellant's favour and that the instrument of transfer had been presented for registration. Despite the express direction to enter a registrar's caveat to prohibit further dealings, the registrar had registered the transfer in favour of the purchaser and had released the issue document of title to the purchaser. In addition, the whole of the purchase price amounting to RM3.8m had been released to the second respondent. The issue before the court now was whether the turn of events had left the appellant bereft of any effective remedy.

Held, allowing the appeal with costs on an indemnity basis:

(1) The effective remedy was to direct the second respondent to pay the appellant's solicitors RM1.9m, representing one-half of the purchase

price with the payment to be effected not later than 4pm on 30 November 2009. The remedy was in the nature of a mandatory injunction the breach of which would attract penal consequences upon the heads of the second respondent's directors, including the firs respondent's common law husband. This court had ample jurisdiction to fashion such specific relief, such as the mandatory injunction in this case, to meet the justice of this case based on its peculiar facts (see para 6).

(2) As for costs, this court had the unfettered discretion to award costs on an indemnity basis. There was no doubt that the first respondent's husband who was the alter ego of the second respondent company had acted in bad faith. Both he and the first respondent had unlawfully deprived the appellant of her legitimate interest in the property (see para 9).

[Bahasa Malaysia summary

Perayu, seorang warganegara Jepun dan responden pertama merupakan rakan kongsi perniagaan dalam sebuah restoran. Perayu dan responden pertama sebagai rakan kongsi kemudiannya bersetuju untuk memulakan satu usahasama yang melibatkan pengambilalihan rumah kedai ('hartanah tersebut') di mana mereka menjalankan perniagaan restoran mereka. Apabila memperolehi hartanah tersebut responden pertama cuba untuk mengambilnya untuk manfaatnya sendiri. Apabila perkara tersebut dihadapkan ke mahkamah ini, ia menganggap responden pertama sebagai seorang pemegang amanah konstruktif dan memutuskan bahawa perayu berhak kepada separuh daripada bahagian hartanah amanah itu sebagai benefisiari di bawah amanah konstruktif. Dia juga berhak untuk menuntutnya daripada responden pertama dan untuk mengesan separuh bahagiannya dalam hartanah itu dalam tangan sesiapapun yang telah memperolehinya. Mahkamah ini juga membuat perintah-perintah yang penting untuk memberikan kesan kepada penghakimannya, yang merangkumi kemasukan satu kaveat pendaftar. Kemudiannya diketahui bahawa responden kedua telah menjual hartanah tersebut kepada pihak ketiga yang telah memperolehinya tanpa pengetahuan bahawa adanya amanah bagi pihak perayu dan suratcara pindahmilik telah diserahkan untuk pendaftaran. Walaupun arahan nyata bagi kemasukan kaveat pendaftar adalah untuk melarang apa-apa urusan lanjut, pendaftar telah mendaftarkan pindakmilik bagi pihak pembeli dan memberikan surat ikatan hakmilik kepada pembeli tersebut. Tambahan pula, keseluruhan harga belian berjumlah RM3.8 juta telah dikeluarkan kepada responden kedua. Isu di hadapan mahkamah kini adalah sama ada kejadian yang tidak dijangka itu telah meninggalkan perayu tanpa apa-apa remedi yang efektif.

Diputuskan, membenarkan rayuan dengan kos atas dasar tanggung rugi:

(1) Remedi yang efektif adalah untuk mengarahkan responden kedua membayar peguam cara perayu sebanyak RM1.9 juta, mewakili separuh daripada harga belian dengan pembayaran dilakukan tidak lewat daripada 4 petang pada 30 November 2009. Remedi tersebut adalah bersifat perintah injunksi mandatori yang mana akan mendatangkan kesan-kesan hukuman kepada pengarah-pengarah responden kedua, termasuk suami *common law* responden pertama. Mahkamah ini mempunyai bidang kuasa yang memadai untuk memberi relief spesifik sedemikian, seperti perintah injunksi mandatori dalam kes ini, untuk memberi keadilan dalam kes ini berdasarkan fakta-faktanya yang tersendiri (lihat perenggan 6).

(2) Bagi kos-kos, mahkamah ini mempunyai budi bicara yang meluas untuk mengawardkan kos-kos atas dasar tanggung rugi. Tidak diragukan bahawa suami responden pertama yang merupakan personaliti kedua syarikat responden kedua telah bertindak dengan niat jahat. Kedua-duanya, dengan menyalahi undang-undang telah menafikan perayu haknya yang sah dalam hartanah tersebut (lihat perenggan 9).]

Notes

For cases on constructive trust in general, see 12 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 2042–2072.

Cases referred to

Co-operative Insurance Society Ltd v Argyll Stores (holdings) Ltd [1997] UKHL 17; [1998] AC 1; [1997] All ER 297; [1997] 2 WLR 898, HL (refd)

Macmillan Inc v Bishopsgate Investment Trust plc and others (No 3) [1995] 3 All ER 747, Ch D (refd)

Seet Soh Ngoh v Venkateswara Sdn Bhd & Anor [1976] 1 MLJ 242, HC (refd)

Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm) [2009] UKHL 39, HL (refd)

Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2) [1970] 2 MLJ 226, FC (refd)

Tan Soo Bing & Ors v Tan Kooi Fook [1996] 3 MLJ 547, FC (refd)

Yeoman's Row Management Ltd & Anor v Cobbe [2008] UKHL 55, HL (refd)

Legislation referred to

National Land Code ss 320, 321, 417

Appeal from: Civil Appeal No W-02–1236 of 2005 (Court of Appeal, Putrajaya)

Manjit Singh Saini (Harun Idris, Yeoh & Partners) for the appellant.
S Parameswary (K Gheethabai and D Mahalingam with him) (Tay, Tee & Nasir) for the second respondent.

Gopal Sri RamFCJ (delivering judgment of the court):

[1] This court by its judgment dated 16 October 2009 found for the appellant on the basis that she is the beneficiary under a constructive trust of which the second respondent is trustee. The subject matter of the trust is the property referred to in that judgment. Argument was sought from counsel as to the nature of the specific relief that should be granted having regard to the facts of this case and also as to the type of costs order that should be made. Evidence was filed by both sides as to the present state of affairs. It emerged, undisputed, that the second respondent had sold the subject property to a third party and that the instrument of transfer had been presented for registration. To prevent any further fraud and for the purpose of preserving the subject property in specie, on 27 October 2009 we directed the Registrar of Titles to enter his caveat pursuant to s 320 read with s 321 of the National Land Code. We did so in the exercise of the powers conferred by s 417 of the National Land Code. It is settled that this court has ample jurisdiction to make consequential orders to give effect to its judgment (see *Tan Soo Bing & Ors v Tan Kooi Fook* [1996] 3 MLJ 547) including directing the entry of a registrar's caveat (see *Seet Soh Ngoh v Venkateswara Sdn Bhd & Anor* [1976] 1 MLJ 242) and to ensure that its judgment in particular cases is not defeated by intervening events.

[2] An illustration is provided by *Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2)* [1970] 2 MLJ 226. There, the former Federal Court gave judgment for the defendant/appellant holding that it had not been guilty of a breach of a mining sublease. However, before the appeal was heard by the Federal Court, the respondents had subleased the land to a third party. After judgment, the appellant moved for an order that the Collector of Land Revenue should delete the cancellation of the sublease. The application was opposed by the respondents and by the third party. The court allowed the application, ordered the deletion of the sublease in favour of the third party and directed the re-registration of the appellant. Suffian FJ who delivered the judgment of the court said:

> Our judgment says that the defendant company was not guilty of breach of condition and that therefore its sublease should not have been cancelled. If it had not been cancelled, then the company would still have been the sublessee, and it alone had power to dispose of any interest in the land; the plaintiffs could not have done so and if they have done so to the detriment of the company's right, the court is not powerless to get Mr Lee Yat Kai off the register. Section 417 of the National

A Land Code clearly says that the court has power to direct the collector to do all such things as may be necessary *to give effect to its judgment or order*. If we did not order the collector to remove Mr Lee's name from the register and put back on it that of the defendant company, we would be allowing the plaintiffs and Mr Lee to thumb their noses at a judgment of the Federal Court, and I do not think that we B should allow that. We should give effect to our judgment and order the collector to get Mr Lee off the register and put the defendant company back on it. (Emphasis added.)

[3] When we convened on 13 November 2009 to hear further argument C and to be advised on the current position, we were surprised to learn that despite our express direction to him to enter his caveat to prohibit further dealings, the registrar had registered the transfer in favour of the purchaser and had released the issue document of title to him. We were also advised that the whole of the purchase price amounting to RM3.8m had been released to D the second defendant. Its counsel suggested that there was nothing much we could do except to enter a monetary judgment in the appellant's favour which may well end up not being worth the paper on which it was printed. With respect, we are unable to agree.

E **[4]** So far as relief is concerned in a case as the present, we derive much assistance from the speech of Lord Scott of Foscote in *Yeoman's Row Management Ltd & Anor v Cobbe* [2008] UKHL 55 where he said:

It is impossible to prescribe exhaustively the circumstances sufficient to create a F constructive trust but it is possible to recognise particular factual circumstances that will do so and also to recognise other factual circumstances that will not. A particular factual situation where a constructive trust has been held to have been created arises out of joint ventures relating to property, typically land. If two or more persons agree to embark on a joint venture which involves the acquisition of an identified piece of land and a subsequent exploitation of, or dealing with, the G land for the purposes of the joint venture, and one of the joint venturers, with the agreement of the others who believe him to be acting for their joint purposes, makes the acquisition in his own name but subsequently seeks to retain the land for his own benefit, the court will regard him as holding the land on trust for the joint venturers. This would be either an implied trust or a constructive trust arising H from the circumstances and if, as would be likely from the facts as described, the joint venturers have not agreed and cannot agree about what is to be done with the land, the land would have to be re-sold and, after discharging the expenses of its purchase and any other necessary expenses of the abortive joint venture, the net proceeds of sale divided equally between the joint venturers.

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[5] In the present case, the appellant and the first respondent as partners, that is to say, as joint venturers, agreed to embark on a joint venture which involved the acquisition of the subject property for the purposes of the partnership, that is to say, the joint venture, and the first respondent with the

agreement of the appellant, her co-joint venturer, who believed her to be acting for their joint purposes, acquired the property in her name but subsequently sought to retain the land for her own benefit. Hence, this court regarded her as a constructive trustee. And in the circumstances of the present case, the just and equitable remedy would have been to sell the subject property and to have the net proceeds divided equally between the parties. However, subsequent events have made this impossible as the second respondent who though bound by the constructive trust has unilaterally sold off the subject property and pocketed the purchase price. The property has gone into the hands of a person who is not alleged to have acquired it with notice of the trust in the appellant's favour. So it cannot now be regained in specie and restitutio in integrum decreed. Does this mean that the appellant is bereft of any remedy? We do not think so. We do not think that the second respondent should be allowed to thumb its nose at our judgment.

[6] In our considered opinion, the effective remedy is to direct the second respondent to pay to the appellant's solicitors (since she is a foreigner and not in Malaysia) the sum of RM1.9m representing one-half of the purchase price. The payment is to be effected not later than 4pm on 30 November 2009. The order we make is in the nature of a mandatory injunction the breach of which will attract penal consequences upon the heads of the second defendant's directors, including, of course, the first respondent's common law husband. We have ample jurisdiction to fashion specific relief, in this instance the remedy of injunction, to meet the justice of this case based on its peculiar facts. As Lord Hoffmann said in *Co-operative Insurance Society Ltd v Argyll Stores (holdings) Ltd* [1997] UKHL 17; [1998] AC 1; [1997] All ER 297; [1997] 2 WLR 898, no doubt in the context of another type of specific relief:

> A decree of specific performance is of course a discretionary remedy and the question for Your Lordships is whether the Court of Appeal was entitled to set aside the exercise of the judge's discretion. There are well established principles which govern the exercise of the discretion but these, *like all equitable principles, are flexible and adaptable to achieve the ends of equity*, which is, as Lord Selborne LC once remarked, to 'do more perfect and complete justice' than would be the result of leaving the parties to their remedies at common law (*Wilson v Northampton and Banbury Junction Railway Co* (1874) 9 Ch App 279 at p 284). Much therefore depends upon the facts of the particular case ...

[7] That brings us to the matter of costs. Learned counsel for the second respondent submitted that the appellant should be awarded costs on a party and party basis. For the appellant it was submitted that she should be awarded indemnity costs having regard to all the circumstances of the case.

[8] Some of the guidelines for an award of indemnity costs were discussed by Millett J (later Lord Millett) in *Macmillan Inc v Bishopsgate Investment Trust plc and others (No 3)* [1995] 3 All ER 747:

> The power to order taxation on an indemnity basis is not confined to cases which have been brought with an ulterior motive or for an improper purpose. Litigants who conduct their cases in bad faith, or as a personal vendetta, or in an improper or oppressive manner, or who cause costs to be incurred irrationally or out of all proportion as to what is at stake, may also expect to be ordered to pay costs on an indemnity basis if they lose, and have part of their costs disallowed if they win. Nor are these necessarily the only situations where the jurisdiction may be exercised; the discretion is not to be fettered or circumscribed beyond the requirement that taxation on an indemnity basis must be 'appropriate'.

[9] What appears clear is that the discretion to award costs on an indemnity basis is unfettered. All that is required is that it must be an appropriate case warranting an award on that basis. There is no doubt that in this case, the second respondent conducted its case in bad faith. Its directing mind and will — indeed its alter ego — was the first respondent's common law husband. In essence he was the company. Both he and the first respondent set themselves upon a course to unlawfully deprive the appellant of her legitimate interest in the subject property. Having regard to his conduct — which is to be equated as the conduct of the second respondent company (see *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] UKHL 39 per Lord Phillips of Worth Matravers at para 51) — we consider this to be an appropriate case to award costs on an indemnity basis at all levels. We so ordered. The deposit in court was ordered to be refunded to the appellant.

Appeal allowed with costs on indemnity basis.

Reported by Kohila Nesan